



Defense POW/Missing Personnel Office

Operations Directorate — Fact Sheet

LEGAL STATUS OF ISOLATED PERSONNEL

ISSUE: Legal Status of Isolated Personnel¹

BACKGROUND: Legal issues are important in operations to recover downed aircrew or other isolated personnel for at least four reasons: (1) they determine whether isolated personnel are authorized to use force to prevent capture; (2) they determine whether force may be used by search and rescue personnel to prevent capture or secure release; (3) they determine the permissible use of force by adversary personnel; and (4) they determine minimum standards for the treatment of personnel in the hands of an adversary.

DISCUSSION:

From a legal standpoint, these issues are clearest during periods of full peace or international armed conflict. In peacetime, the rescue of a pilot downed in the territory of another state – assuming he had the consent of the territorial state to operate in its airspace – is primarily the responsibility of the territorial state. None of the parties is authorized to use force except in self-defense. Rescued airmen in such situations must be treated humanely, are not subject to detention, and must be returned to their own authorities as soon as possible. If the pilot were operating in the territorial state's airspace without its express or implied permission, the result would be the same except that the pilot would be subject to detention and criminal prosecution for any offenses the pilot may have committed against the territorial state's domestic laws. The primary means for obtaining the release of downed aircrew in peacetime is diplomatic.

At the other end of the peace-war spectrum is international armed conflict, such as Desert Storm. Enemy combatant forces are declared hostile, and may lawfully be attacked. A downed pilot may use force against enemy combatants to resist capture. Rescue forces may use force to prevent enemy combatants from capturing a downed pilot, or to rescue him if he has already been captured. Enemy forces are entitled to use necessary force to capture a downed pilot, and to prevent his rescue. Once captured by enemy forces, a downed pilot is a prisoner of war (PW), and is entitled to the humane treatment guaranteed to PWs by the law of war, most notably by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. A PW legally may be detained until the cessation of hostilities.

A much harder set of legal issues arises when there is no state of international armed conflict, but the military forces of UN member nations are authorized to use armed force by resolutions of the United Nations Security Council (UNSC) to prevent a breach of or to restore international peace and security. The majority view among nations is that members of such forces are entitled to be treated as experts on mission for the United

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Nations. This status was created by the 1946 Convention on the Privileges and Immunities of the United Nations. Experts on mission are normally authorized by UNSC resolutions to use all necessary means to enforce those resolutions. Unless the situation escalates to an international armed conflict, experts on mission are entitled to immunity from attack or detention. If they are improperly detained, they must be protected, treated humanely, and promptly released. If a rescue force were able to recover a downed pilot before the forces of the territorial state captured him, such a rescue would be considered by most states to be within the mandate of the force to which he belonged. It would be much more difficult, however, to justify the use of armed force by a downed pilot or by a rescue force to prevent his capture or to rescue him, except in cases of self-defense. The application of the experts on mission principle to forces engaged in offensive operations has been somewhat controversial. In 1994 a Convention on the Safety of United Nations and Associated Personnel was negotiated to help clarify such issues, but the draft treaty is itself controversial and apparently will not be ratified by enough states to enter into force anytime soon, if ever.

When a state uses armed force without the authority of a UNSC resolution, based on some other principle of international law such as self-defense (e.g. the 1985 U.S. bombing of Libya) or authorization by a regional international organization (e.g., the U.S. invasion of Panama or threatened NATO air strikes against Yugoslavian forces in Kosovo), the principle of experts on mission for the United Nations does not apply. The conduct of search and rescue operations would probably be considered to be an inherent part of whatever operations were being conducted, but it would be hard to justify the use of armed force by either the downed pilot or the rescue forces to prevent capture except in cases of self-defense.

In every case the United States will take the position that a detained pilot must be treated humanely, at least as well as the treatment required for PWs. The United States will also argue for prompt release, in every situation except for international armed conflicts, when PWs may be detained until the cessation of hostilities.

The United States has been very reluctant to assert that its detained personnel are PWs except when there is clearly an international armed conflict. This policy is based both on the fact that PWs may be detained until the cessation of hostilities and on a recognition that an assertion of PW status implies that there is in fact a state of international armed conflict, which legitimizes attacks by and against both sides to the conflict, limited only by the law of war.

Recent U.S. practice has been to address legal status issues in each operation's execute order or rules of engagement. There has not always been unanimity on these issues within the U.S. Government, much less among coalition partners or adversaries. Nevertheless, we are gradually building common understandings and accumulating past practice concerning them. Individuals and units involved in contingency operations should insist that authoritative guidance on legal issues be included in their mission planning.